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Utusan Melayu (M) Bhd (in voluntary winding up) v Menteri Sumber Manusia & Ors and another application

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HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NOS WA-25–322–10 OF 2020, WA-25–324–11 OF 2020 AND WA-25–330–11 OF 2020
AHMAD KAMAL J
27 OCTOBER 2022

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Companies and Corporations — Winding up — Creditors voluntary liquidation ('CVL') — Former workers of company which ceased operations and went under CVL filed representations over their loss of jobs with Director-General of Industrial Relations ('DG') — DG referred the representations to Human Resources Minister who in turn referred them to Industrial Court for adjudication under s 20(3) Industrial Relations Act 1967 ('IRA') — Whether Minister's reference was irrational, contravened the law and had to be quashed as: (a) the ex-workers did not obtain leave of winding up court under s 451(2) of Companies Act 2016 ('CA') to commence action against company; and (b) they could not obtain reinstatement but only damages — Whether ex-workers had already sought damages by filing proofs of debt with the liquidator of the company — Whether Minister's discretion to make reference to Industrial Court under s 20(3) IRA was not unlimited but could be circumscribed by other laws such as s 451(2) of the CA

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The applicant terminated the services of all its employees, including the respondents, when it ceased operations and went under creditors' voluntary liquidation ('CVL'). All the ex-employees, including the respondents, lodged representations over their termination with the Director-General of Industrial Relations ('the DG') under the Industrial Relations Act 1967 ('the IRA'). When attempts to bring about reconciliation between the ex-employees and the applicant failed, the DG referred the matter to the Human Resources Minister ('the Minister') who, in turn, referred the respondents' representations to the Industrial Court for adjudication pursuant to s 20(3) of the IRA ('the decision'). The applicant filed the instant judicial review applications for an order to quash the decision on the ground that it was made ultra vires or without jurisdiction and in wrongful exercise of discretion. The applicant contended that the Minister failed to consider that: (a) since the applicant was under liquidation, no action or proceeding could be proceeded with or commenced against the applicant without first obtaining leave of court under s 451(2) of the Companies Act 2016 ('the CA'); and (b) since it was impossible for the respondents to obtain reinstatement, their only remedy lay in damages for which they had already filed proofs of debt with the liquidator of the applicant.

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Held, allowing the judicial review applications:

(1) The Minister had acted illegally, irregularly and in contravention of the law when he decided to refer the respondents' representations to the Industrial Court for adjudication (see para 36).

(2) The wide discretion given to the Minister under s 20(3) of the IRA was not unlimited but limited by other contemporaneous positions of law, in this case, by s 451(2) of the CA which required the respondents to obtain leave of the winding up court before they commenced any action or proceeding against the applicant. The general provision in s 20(3) of the IRA had to take into consideration the more specific law (s 451 of the CA) that governed a company's winding up. Hence, s 20(3) of the IRA had to be read together with s 451(2) of the CA, more so when the Minister was aware that the applicant had been placed under CVL and that proofs of debt had been filed in the liquidation (see paras 24, 26 & 28).

(3) Since the Minister knew that the applicant had been placed under CVL, he must have known that the proper remedy for the respondents was vested in the winding up process. Given that the respondents could no longer seek reinstatement, because the applicant had ceased operations, their only remedy was monetary, and that remedy was capable of being adequately dealt with in the liquidation process through the lodgment of the proofs of debt. The lodgment of the proofs by the respondents indicated that they had chosen to submit to the winding up process and they were therefore estopped from continuing with the Industrial Court proceedings (see paras 25 & 29–31).

[Bahasa Malaysia summary

Pemohon telah menamatkan perkhidmatan semua pekerjanya, termasuk responden, apabila ia berhenti beroperasi dan berada di bawah penggulungan sukarela pemiutang ('CVL'). Kesemua bekas pekerja, termasuk responden, mengemukakan representasi berhubung pemberhentian mereka kepada Ketua Pengarah Perhubungan Perusahaan ('KP') di bawah Akta Perhubungan Perusahaan 1967 ('APP'). Apabila percubaan untuk membawa perdamaian antara bekas pekerja dan pemohon gagal, KP merujuk perkara tersebut kepada Menteri Sumber Manusia ('Menteri') yang seterusnya, merujuk representasi responden ke Mahkamah Perusahaan untuk adjudikasi menurut s 20(3) APP ('keputusan tersebut'). Pemohon memfailkan permohonan semakan kehakiman semasa untuk satu perintah untuk membatalkan keputusan tersebut atas alasan ia dibuat ultra vires atau tanpa bidang kuasa dan menggunakan budi bicara yang salah. Pemohon berhujah bahawa Menteri gagal mempertimbangkan bahawa: (a) memandangkan pemohon berada di bawah penggulungan, tiada tindakan atau prosiding boleh diteruskan atau dimulakan terhadap pemohon tanpa terlebih dahulu mendapat kebenaran

mahkamah di bawah s 451(2) Akta Syarikat 2016 ('AS'); dan (b) memandangkan ianya adalah mustahil bagi responden untuk mendapatkan pengembalian jawatan, satu-satunya remedi mereka adalah ganti rugi yang mana mereka telah memfailkan bukti keberhutangan dengan pelikuidasi pemohon.

Diputuskan, membenarkan permohonan semakan kehakiman:

(1) Menteri telah bertindak secara tidak sah, tidak teratur dan melanggar undang-undang apabila beliau memutuskan untuk merujuk representasi responden ke Mahkamah Perusahaan untuk adjudikasi (lihat perenggan 36).

(2) Budi bicara luas yang diberikan kepada Menteri di bawah s 20(3) APP bukanlah tidak terhad tetapi dihadkan oleh kedudukan undang-undang kontemporari yang lain, dalam kes ini, oleh s 451(2) AS yang memerlukan responden untuk mendapatkan kebenaran mahkamah penggulungan sebelum mereka memulakan sebarang tindakan atau prosiding terhadap pemohon. Peruntukan am dalam s 20(3) APP perlu mengambil kira undang-undang yang lebih khusus (s 451 AS) yang mengawal penggulungan syarikat. Oleh itu, s 20(3) APP perlu dibaca bersama dengan s 451(2) AS, lebih-lebih lagi apabila Menteri menyedari bahawa pemohon telah diletakkan di bawah CVL dan bukti keberhutangan telah difailkan dalam penggulungan tersebut (lihat perenggan 24, 26 & 28).

(3) Memandangkan Menteri mengetahui bahawa pemohon telah diletakkan di bawah CVL, beliau pasti tahu bahawa remedi yang sesuai untuk responden adalah terletak pada proses penggulungan. Memandangkan responden tidak lagi boleh mendapatkan pengembalian jawatan, kerana pemohon telah berhenti beroperasi, satu-satunya remedi mereka adalah kewangan, dan remedi tersebut mampu ditangani dengan secukupnya dalam proses penggulungan melalui penyerahan bukti keberhutangan. Penyerahan bukti tersebut oleh responden menunjukkan bahawa mereka telah memilih untuk menyerahkan kepada proses penggulungan dan oleh itu mereka dihalang daripada meneruskan prosiding Mahkamah Perusahaan (lihat perenggan 25 & 29–31).]

Cases referred to

Craven v Blackpool Greyhound Stadium & Racecourse Ltd [1936] 3 All ER 513, CA (refd)

Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9; [1990] 1 CLJ 195; [1990] 2 MLRA 246, SC (refd)

Mosbert Berhad (in liquidation) v Stella D' Cruz [1985] 2 MLJ 446; [1985] 1 MLRA 558, SC (folld)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2

MLJ 317; [1995] 1 MLRA 268; [1995] 2 CLJ 748; [1995] 2 AMR 1601, CA (refd)

Legislation referred to

Companies Act 2016 ss 451, 451(2), 456, Eleventh Schedule, Twelfth Schedule, Parts I, II
Industrial Relations Act 1967 s 20(3)
Rules of Court 2012 O 53

Rajvinder Singh (with Afdhilani bt Jusoh @ Alias) (Dennis Nik & Wong) in Application for Judicial Review Nos WA-25–322–10 of 2020, WA-25–324–11 of 2020 and WA-25–330–11 of 2020 for the applicant.
Aisyaf Falina bt Abdullah (with Mohd Izhanuddin bin Alias and Rohaiza bt Hamzah) (Senior Federal Counsel, Attorney General's Chambers) in Application for Judicial Review Nos WA-25–322–10 of 2020, WA-25–324–11 of 2020 and WA-25–330–11 of 2020 for the first respondent.
Tengku Azlina Tengku Ismail (Tengku Azlina, Azlan Shah & Azman) in Application for Judicial Review Nos WA-25–322–10 of 2020, WA-25–324–11 of 2020 and WA-25–330–11 of 2020 for the other respondents.

Ahmad Kamal J:

INTRODUCTION

[1] The applicant had filed Judicial Review Applications No WA-25–322–10 of 2020 ('JR 322'), No WA-25–324–11 of 2020 ('JR 324') and No WA-25–330–11 of 2020 ('JR 330') under O 53 of the Rules of Court 2012 ('the ROC') for amongst others, an order of certiorari to quash the decision of the Honourable Minister of Human Resources ('the Minister') dated 4 August 2020 and 10 August 2020 respectively pursuant to s 20(3) of the Industrial Relations Act 1967 (Act 177) to refer the dismissal of the ex-applicant's employee (the respondents) to the Industrial Court.

[2] Both JR 324 and JR 330 are fixed to be heard together with this JR 322.

[3] After the hearing, I allowed the applicant's application in JR 322, JR 324 and JR 330.

[4] Dissatisfied with the decision, the respondents in JR 322 and JR 330 filed an appeal. However, the respondent in JR 324 did not file any appeal against the decision. I will now set out the grounds for my decision.

A BACKGROUND FACTS

[5] The narration of the background facts of the case is adopted with and/or without modifications from the applicant's affidavit in support, statement and written submissions of both parties and can be summarized as follows:

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(a) on 7 October 2019, the Board of Directors of the applicant declared that the applicant is unable to continue its business by reason of its liabilities and Datuk Tee Guan Pian was appointed as the interim liquidator for the applicant;

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(b) subsequently, a Members' and Creditors' Meetings were held separately on 6 November 2019 whereas Datuk Tee Guan Pian has been appointed as the liquidator of the applicant;

(c) on 19 December 2019, following the applicant's application to court vide Originating Summons No WA-24NCC-678–12 of 2019, approval was granted to the liquidator pursuant to s 456 of the Companies Act 2016 (the CA) read together with the Eleventh Schedule to exercise all functions and powers of the liquidator provided under Parts I and II of the Twelfth Schedule of the CA;

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(d) the respondents are the ex-employees of the applicant herein that has lodged a representation to the Director General of Industrial Relations (DG of IR) on their termination from the applicant;

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(e) pursuant to the liquidation of the applicant on 7 October 2019, the applicant has ceased its operation which in turn led to the termination of all the employees of the applicant inclusive of the respondents herein;

(f) the respondents together with 347 ex-employees of the applicant herein have lodged a representation to the DG of IR;

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(g) the DG of IR upon receipt of the representation called for reconciliation meetings between the respondents and other ex-employees (in a separate meeting) with the liquidator of the applicant, but was unsuccessful. Thereafter, the DG of IR referred the matter to the Minister; and

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(h) vide letter dated 4 August 2020, the Minister decided for the representations of the respondents to be referred to the Industrial Court under s 20(3) of Act 177 ('the said decision').

I THE APPLICANT'S GROUNDS FOR THE JUDICIAL REVIEW

[6] The applicant's applications herein are based on the following grounds:

(a) the Minister has misdirected himself in law and had acted without jurisdiction and/or exceeded the powers given to him under the law and had misused his discretion by failing to take into consideration the following:

(i) that the applicant herein has been placed under creditors voluntary liquidation (CVL) on 7 October 2019;

(ii) pursuant to s 451(2) of the CA, no action or proceeding shall be proceeded with or commenced against the applicant without leave from the court; and

(iii) the remedy sought by the respondents herein can be dealt with in liquidation process as the respondents have filed proofs of debt.

[7] By issuing the said decision:

(a) the Minister has acted without any jurisdiction and/or illegality by allowing the representation to be referred to the Industrial Court when the applicant has been placed in liquidation;

(b) the Minister has acted in excess of jurisdiction and/or illegality by allowing the representation to be referred to the Industrial Court when the applicant has been placed in liquidation without leave of the winding up court;

(c) the Minister is wrong when he applied irrelevant consideration to allow representation under s 20(3) of Act 177 when the applicant has ceased business and is under liquidation;

(d) in allowing the representation without leave from the court, it will open a floodgate of cases against the applicant herein;

(e) further, the applicant will be embroiled in time consuming and expensive litigation which, will impact on the returns to the creditors of the applicant;

(f) all of the employees of the applicant except Encik Ahmad Haziq bin Md Shah and Encik Lukman bin Ismail have filed proofs of debt with the applicant and the employees' claims have been recorded substantially in the statement of affairs prepared by the director of the applicant;

(g) to-date, the liquidator has not adjudicated the proofs of debt. this is because the liquidation of the applicant's assets is still on-going;

(h) the remedy sought by the respondents can only be confined to monetary compensation which the said issue can be dealt with in the winding up process; and

(i) based on the foregoing, the respondents are estopped from proceeding with the proceedings in the industrial court.

A THE LAW

[8] Judicial review is generally concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety.

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[9] However, the law has now developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permits the courts to scrutinize the decision not only for the process, but also for substance.

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[10] It is settled law that the High Court will not interfere with a decision of the Minister and/or the Industrial Court unless it can be established that the decision is infected with errors of law.

D **[11]** The meaning of error of law has also been explained by the Court of Appeal in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 1 MLRA 268; [1995] 2 CLJ 748; [1995] 2 AMR 1601 in the following words:

E > *It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law*, for the categories of such an error are not closed. *But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations* (what may be conveniently termed an Anisminic error) or *if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law*. (Emphasis added.)

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[12] Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the applicant must show that the Minister had, among others:

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(a) asked itself the wrong questions;

(b) considered irrelevant matters;

(c) failed to consider relevant matters;

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(d) failed to apply the proper principle(s) of law; and/or

(e) reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

I THE DECISION OF THE COURT

[13] It is a fact not disputed by all the parties that when the Minister made a decision to refer the representation of the respondents, the Minister was fully aware that the applicant has ceased operation and has been wound up.

[14] This can be gleaned from the Minister's affidavit in reply (encl 24) in para 21 when he admitted as follows:

> 21.1 Saya mengambil maklum Pemohon telah diletakkan di bawah Penggulungan Sukarela Pemiutang pada 7.10.2019.

[15] Section 451 of CA states as follows:

> 451 Property and proceedings
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> (1) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of a creditors' voluntary winding up shall be void.
>
> (2) After the commencement of the winding up, *no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court* and subject to such terms as the Court may impose. (Emphasis added.)

[16] Based on the above, it is my view that since the applicant was placed under CVL on 7 October 2019, the respondents are required to seek leave in the winding up court to commence their action against the company as provided under s 451(2) of the CA.

[17] Therefore, the respondents are ought to seek leave from the winding up court to institute action and/or proceedings against the applicant.

[18] The guiding principle in deciding whether or not leave ought to be granted to commence legal action against a wound up company can be found in the then Supreme Court case of *Mosbert Berhad (in liquidation) v Stella D' Cruz* [1985] 2 MLJ 446; [1985] 1 MLRA 558 where it was held as follows:

> In *Re Cuthbert Lead Smelting Co Ltd*. It was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, *the court will always give an applicant leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in a winding up proceedings.* (Emphasis added.)

[19] Coming back to the facts in the present case, the Minister has knowledge that the applicant has been wound up, the Minister knew that the proper remedy for the respondents is vested in the winding up process procedure as admitted in para 21.1 of encl 24:

> 21.1 Saya mengambil maklum Pemohon telah diletakkan di bawah Penggulungan Sukarela Pemiutang pada 7.10.2019.

[20] I view that the Minister was not properly advised by the DG of IR in

pertaining to the procedural remedy against a wound up company. Therefore, the notification made to the Minister by the DG of IR was wrong, irregular and unreasonable.

[21] It shall be noted that all of the employees of the applicant except Encik Ahmad Haziq bin Mad Shah and Encik Lukman bin Ismail have file proofs of debt with the applicant and the employees claims have been recorded substantially in the statement of affairs prepared by the director of the applicant and the proofs of debt are now pending adjudication by the liquidator of the applicant.

[22] Further, I find that the current situation involves a case of termination of employees due to the cessation of operation of the company and the company has been placed under creditors' winding up and not a conventional 'unlawful' dismissal.

[23] The Minister has submitted that there are no provisions under s 20(3) of Act 177 which prevented any representation made in the situation of a wound up company.

[24] However, I am of the view that the position of s 451(2) of the CA shall be read together with s 20(3) of Act 177 in dealing with the present application especially when the Minister has knowledge that the applicant has been wound up and proofs of debt have been filed. It is also pertinent in the instant case that the applicant has been placed under the CVL when the representation was referred to the Minister.

[25] Therefore, since the Minister has knowledge that the applicant has been wound up, the Minister knew that the proper remedy for the respondents is vested in the winding up process procedure as admitted in para 21.1 of affidavit in reply (encl 24).

[26] In light of the above and due to the fact that the applicant has been placed under the CVL, it is my view that the provisions of s 20(3) of Act 177 ought to be read together with s 451 of the CA. The general provision of s 20(3) of Act 177 shall take into consideration of the more specific law that governs a winding up company ie, s 451 of the CA.

[27] The then Supreme Court in the case of *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9; [1990] 1 CLJ 195; [1990] 2 MLRA 246 held as follows:

> *The minister's discretion under s 20(3) is wide but not unlimited …* (Emphasis added.)

[28] Based on the above, it is my judgment that the wide discretion as provided under s 20(3) of Act 177 is not unlimited and shall be limited by other contemporaneous positions of law ie, s 451(2) of the CA.

[29] In the instant case, it is undisputed fact that the main reason for termination of the employment of the respondents was due to the liquidation and the operation of the applicant has been ceased, therefore it is impossible for the applicant to offer any reinstatement to the employees.

[30] As reinstatement is impossible, the remedies left (if any) to the respondents are in terms of monetary form and the only remedy that can be sought by the respondents herein is in monetary nature which can be dealt adequately with in liquidation process as the respondents have filed their proofs of debt as shown in exh TGP6, encl 4 (*Jld* 2) on pp 271–282.

[31] It is clear that the lodgement of proofs of debt indicates that the respondents choose to subject themselves to the winding up proceedings and the respondents are thereafter estopped from continuing with the Industrial Court proceedings (see *Craven v Blackpool Greyhound Stadium & Racecourse Ltd* [1936] 3 All ER 513).

[32] In light of the above, it is my view that by issuing the said decision, the Minister has misdirected himself in law and had exceeded the powers given to him under the law and had misused his discretion by failing to take into consideration the above.

[33] I am of the considered opinion that the decision made by the Minister in referring the representation to the Industrial Court does amount to an unreasonable decision that no sensible person would have arrived into that decision given all the facts and circumstances in hand.

[34] It is also my considered view that in allowing the representation without leave from the court, it will open a floodgate of cases against the applicant herein and employees of a wound up company and will defeat the intention of the Parliament for specific law that governs the company in liquidation ie the CA.

CONCLUSION

[35] Based on the reasons above, it is my considered view that decisionmaking process by the Minister is tainted with illegality and/or irrationality and/or procedural impropriety as the wrong law has been applied accordingly.

A **[36]** Based on the foregoing, it is clear that the Minister has acted illegally, irregularly and in contravention with provisions of law in making the representation to the Industrial Court.

B **[37]** As such, the applicant's applications for judicial review in JR 322, JR 324 and JR 330 are allowed with no order as to costs.

Judicial review applications allowed.

Reported by Ashok Kumar

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